

## **MINUTES**

Supreme Court's Advisory Committee  
on the Rules of Appellate Procedure

Administrative Office of the Courts  
450 South State Street  
Salt Lake City, Utah 84114

October 4, 2012

### **ATTENDEES**

Joan Watt - Chair  
Judge Gregory Orme  
Judge Fred Voros  
Diane Abegglen  
Paul Burke  
Marian Decker  
Bridget Romano  
Clark Sabey  
Lori Seppi  
Ann Marie Taliaferro  
Mary Westby

### **EXCUSED**

Troy Booher  
Bryan Pattison

### **STAFF**

Brent Johnson

## **I. Welcome and Approval of Minutes**

Joan Watt welcomed the committee members to the meeting and introduced Mary Westby as the newest committee member. Ms. Watt stated that Tawni Anderson has resigned from the committee and if anyone has suggestions on a replacement to please pass that on to Ms. Watt. Clark Sabey noted one change to the minutes. With the change, Bridget Romano moved to approve the minutes. Lori Seppi seconded the motion and the motion carried unanimously.

## **II. Rule 4**

Ms. Watt reminded committee members about discussions at the June meeting concerning rule 4, and reinstating the time for appeal in civil cases. Marian Decker stated that her subcommittee had met with the rule 58 subcommittee and the combined subcommittees determined not to change rule 4, but to instead fix rule 58 by deleting the problematic provision and creating a new process for extending the time for appeal. Diane Abegglen distributed a copy of the civil procedure committee's recommendation. Ms. Abegglen noted that the civil procedure committee is concerned about the implications this may have on the finality of judgments and opening

judgments to post-judgment motions by reentering the judgment. Ms. Romano commented that the proposal seems too broad for addressing a very narrow problem.

Mary Westby suggested that the problem could be addressed through rule 4(e) by having the rule address the failure to serve the judgment. Ms. Decker stated that the subcommittees did not want to disturb established law in rule 4. Judge Fred Voros agreed that this could be a rule 4(e) issue by listing failure to serve as good cause. Ms. Romano stated that, as the courts move to electronic filing there will not be a need to change to rule 4, although there still may be a need to address the problem with inmates. Judge Voros noted that changing rule 4 would address the concerns about post-judgment motions.

Ms. Decker suggested that the committee let the civil procedure committee complete its work and then this committee can determine what action might be necessary. Ms. Watt suggested that she call Fran Wikstrom to gauge where they are in their process and convey the committee's discussions about rule 4. Ms. Sabey stated that the problem is not limited to inmates but extends to other pro se individuals. Judge Orme noted that some attorneys might abuse the process. Ms. Abegglen stated that Mr. Wikstrom will be surprised to learn that the committee is open to rule 4 changes. Judge Orme expressed the opinion that a rule change should not address finality issues except for purposes of extending the time for appeal. Judge Orme stated that this should not create new opportunities for post-judgment motions and there should be a strict time-frame for when requests must be raised.

Ms. Watt suggested that rule 4 may be the appropriate place for a change because the Manning procedure in criminal cases is incorporated into rule 4. Ms. Seppi noted that Manning is directed at ineffective assistance of counsel and therefore that standard will not work well in the civil context. The committee agreed that Ms. Watt should contact Mr. Wikstrom to convey the committee's discussions and to let him know that this committee is still open to rule 4 changes.

### **III. Rule 38B/11-401**

Judge Voros reminded the committee members of the history of proposed changes to rule 38B. Judge Voros stated that the combined subcommittees had proposed changes to rule 38B. Judge Voros stated that the changes were minimal and he will email the proposed changes to the committee members so that the changes may be reviewed at the next meeting. Judge Voros stated that this issue is also connected to rule 23B and the task force is still concerned with what might happen with that rule.

### **IV. Rule 23B Update**

Ms. Watt reminded committee members that the committee had recommended repeal of rule 23B. Ms. Watt stated that the rule 23B subcommittee had met and discussed a variety of ways to retain rule 23B, but, to then refine and improve the process. Ms. Watt stated that the subcommittee was ultimately unable to develop a workable process and therefore the subcommittee recommends that rule 23B be repealed. Judge Voros stated that the problem is that ineffective assistance of counsel claims fit better in the post-conviction setting, but the

reason they were shifted to appellate review is because that is when defendants have the benefit of appointed counsel. Judge Voros suggested that if the resources for appointed counsel could be shifted to the post-conviction setting then that would help support a repeal of rule 23B. Judge Voros stated that the challenge is trying to find a way to shift those funds.

Ms. Watt stated that the rule 23B subcommittee had discussed ways to increase the opportunities for appointment of counsel on habeas review. Ms. Seppi stated that counsel would need to be appointed early-on because these cases are often won or lost based on the petition and counsel should be involved in reviewing and filing such petitions. Ann Marie Taliaferro noted that, in a previous meeting, the committee discussed the fact that even without the rule parties could ask for a remand. Ms. Taliaferro posed the question of whether the appellate courts would, based on the repeal of rule 23, reject those requests. Judge Orme stated that this is a possibility. Ms. Westby suggested that the scope of the rule could be narrowed, noting that successful rule 23B motions typically deal with alibis and expert witnesses. Judge Voros stated that the subcommittee spent several meetings trying to refine the rule, but could not develop a workable solution. Ms. Watt suggested that Ms. Westby join the subcommittee to offer her perspective on what she is seeing in the courts.

Ms. Taliaferro proposed having appellate counsel suggest appointment of habeas counsel at the conclusion of an appeal. Ms. Taliaferro stated that appellate counsel will have the benefit of reviewing the case and assessing whether there is a legitimate ineffective assistance of counsel claim. Judge Voros agreed that this might be a good idea and would also help courts in identifying legitimate claims. Ms. Seppi noted that this would also limit expenses, as counsel would only be appointed in those circumstances when the trial court has been alerted to potential issues. Ms. Watt stated that the subcommittee will continue to review the issue with Mary Westby joining the subcommittee.

## **V. Rule 24**

Ms. Watt suggested that the committee members review rule 24 for discussion at the next meeting.

## **VI. Other Business/Adjourn**

Ms. Watt stated that she wants to discuss rule 37 on mootness and how it is difficult for defense counsel to comply with the rule because defendants often do not agree on mootness. The committee will also discuss over-length briefs at the next meeting.

The committee scheduled its next meeting for November 6. Paul Burke moved to adjourn the meeting. Bridget Romano seconded the motion. The motion carried. The meeting adjourned at 1:20 p.m.